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Harpajan Kaur a/p Delib Singh v Public Prosecutor

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HIGH COURT (GEORGETOWN) — CRIMINAL APPEAL NO PA-41S-16–11 OF 2019
MOHD RADZI JC
23 DECEMBER 2020

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellant was found guilty of offence under s 29(1) of the Minor Offences Act 1955 and sentenced to six months imprisonment under each charge which were to run concurrently — Appeal on issues of law — Whether word 'property' under s 29(1) of the Minor Offences Act 1955 included monies held in bank account — Whether there could be 'possession' of monies in bank account within context of s 29(1) of the Minor Offences Act 1955 — Whether there was error or omission in stating ingredients or particulars of offence in the charges — Whether error or omission could be cured by either s 156 or s 422 of the Criminal Procedure Code — Criminal Procedure Code ss 156 & 422 — Minor Offences Act 1955 s 29

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Statutory Interpretation — Construction of statutes — Legislative intent — Whether word 'property' under s 29(1) of the Minor Offences Act 1955 included monies held in bank account — Whether there could be 'possession' of monies in bank account within context of s 29(1) of the Minor Offences Act 1955 — Minor Offences Act 1955 s 29

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The complainant ('SP1') was acquainted with one Karnail Singh ('Karnail') through his friend known as Patmendar Singh ('Patmendar'). Karnail informed SP1 that he could assist SP1 in securing a grass cutting and cleaning services contract ('the contract') from the Ministry of Defence. SP1 then deposited a total sum of RM45,488 into the bank account of Karnail's wife ('the appellant') for the purpose of securing such contract but up until 26 November 2016, there was no news regarding the contract. Consequently, SP1 filed a police report and subsequently, the appellant was charged for three offences under s 29(1) of the Minor Offences Act 1955 ('the Act') ie for fraudulent possession of property. The magistrate found that prima facie case was established and called the appellant to enter her defence. The appellant's defence was that the bank account was opened for the benefits of Karnail who had possession over the ATM card and thus control over the funds, as such, she had no reason to be suspicious of the amount deposited in the said account. At the end of trial, the magistrate found the appellant guilty of the offences and consequently, the appellant was convicted and sentenced to six months imprisonment under each charge which were to run concurrently. Aggrieved

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by the decision, the appellant filed the present appeal. The issues of law to be determined in the present appeal were: (a) whether the word 'property' under s 29(1) of the Act included monies held in a bank account; (b) whether there could be 'possession' of monies in a bank account within the context of s 29(1) of the Act; and (c) whether there was an error or omission in stating the ingredients or particulars of the offence in the charges and whether the error or omission could be cured by either ss 156 or 422 of the Criminal Procedure Code ('the CPC').

Held, allowing the appeal, and setting aside the conviction and sentence:

(1) Based on s 29(1) of the Act, the word 'property' was hinged upon the word 'possession'. Such 'property' must be able to be in possession of an accused. Monies in an account was recognised as a chose in action and not corporeal property since monies in an account was a debt owed by the bank to the customer. Since monies in a bank account was merely a chose in action, an account holder could not be said to be in possession of monies held in a bank account and hence was not the type of property that could be in the possession of the accused under s 29(1) of the Act. Further, it was not the intention of the legislators to include a chose in action within the ambit of s 29 of the Act based on sub-s (4), (6), (7), (8) and (9) of s 29 where the legislature had envisaged that the property could be searched and found in geographical and physical locations (see paras 21, 24 & 27–28).

(2) If the legislators had intended the word 'property' to include both corporeal and incorporeal property, then the word 'property' would have been used consistently throughout s 29 of the Act without also using the words 'anything' or 'thing'. The deliberate use of the words 'anything' and 'thing' apart from the word 'property' in s 29(1) of the Act were intended to refer to corporeal or tangible property and for that reason, s 29(4) of the Act must mean locations where a tangible and moveable property could be found. A chose in action was not a 'thing' that was within the contemplation and scope of 'possession' and 'property' under s 29(1) of the Act (see paras 29 & 32).

(3) Since the court held that 'property' under s 29(1) of the Act did not include intangible property such as a chose in action of which monies in a bank constituted, there could not be an offence for possession of such property under that provision. The charges were therefore wrongfully brought against the appellant and was therefore illegal. Since the charges were made based on a fundamentally flawed understanding and application of the law, the charges must therefore be defective and could not be cured whether by the application of ss 156 or s 422 of the CPC. The charges did not establish an offence under the law and the trial was consequentially a nullity (see paras 34 & 36).

(4) The court could not agree with the respondent's submission that the appellant was not misled by all the charges since she had defended the charges at the trial. Plainly the appellant was misled when the subject matter ie monies in bank account were not within the ambit of s 29(1) of the Act to begin with and that surely prejudiced the appellant. This was not a case where there was an error or omission in stating the ingredient of the offence but a case where the law did not apply to the facts in question (see para 37).

(5) Based on the above findings, the court found that all the charges were fundamentally defective, bad in law and incurable. On that basis, the magistrate had erred in finding that a prima facie case was established by the respondent. There was no judicial appreciation of whether the law applied to the facts stated in the charges. The defence should not have been called and the conviction was a nullity (see para 38).

[Bahasa Malaysia summary

Pengadu ('SP1') berkenalan dengan seorang Karnail Singh ('Karnail') melalui rakannya yang dikenali sebagai Patmendar Singh ('Patmendar'). Karnail memberitahu SP1 bahawa dia boleh membantu SP1 dalam mendapatkan kontrak perkhidmatan memotong dan membersihkan rumput ('kontrak tersebut') dari Kementerian Pertahanan. SP1 kemudian memasukkan sejumlah RM45,488 ke dalam akaun bank isteri Karnail ('perayu') untuk tujuan mendapatkan kontrak tersebut tetapi sehingga 26 November 2016, tidak ada berita mengenai kontrak tersebut. Akibatnya, SP1 membuat laporan polis dan kemudiannya, perayu didakwa atas tiga kesalahan di bawah s 29(1) Akta Kesalahan Kecil 1955 ('Akta') iaitu kerana pemalsuan pemilikan harta benda. Majistret mendapati bahawa kes prima facie telah dibuktikan dan memanggil perayu untuk membela diri. Pembelaan perayu adalah bahawa akaun bank tersebut dibuka untuk kepentingan Karnail yang memiliki kad ATM dan dengan itu mengawal dana di dalamnya, oleh itu, dia tidak mempunyai alasan untuk curiga dengan jumlah yang dimasukkan ke dalam akaun tersebut. Pada akhir perbicaraan, majistret mendapati perayu bersalah dan akibatnya, perayu telah disabitkan dan dijatuhkan hukuman penjara enam bulan bagi setiap pertuduhan dan hukuman berjalan serentak. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan semasa. Isu-isu undang-undang yang perlu ditentukan dalam rayuan semasa adalah: (a) sama ada perkataan 'harta' di bawah s 29(1) Akta tersebut termasuk wang yang disimpan dalam akaun bank; (b) sama ada boleh terdapat 'pemilikan' wang dalam akaun bank dalam konteks s 29(1) Akta; dan (c) sama ada terdapat khilaf atau kelalaian dalam menyatakan kandungan atau butir-butir kesalahan dalam pertuduhan-pertuduhan tersebut dan sama ada khilaf atau kelalaian tersebut boleh dibetulkan dengan menggunapakai ss 156 atau 422 Kanun Tatacara Jenayah ('KTJ').

Diputuskan, membenarkan rayuan dan mengenepikan sabitan dan hukuman:

(1) Berdasarkan s 29(1) Akta, perkataan 'harta' bergantung pada perkataan 'pemilikan'. 'Harta' tersebut mestilah boleh berada dalam milikan tertuduh. Wang dalam akaun diperakui sebagai 'chose in action' dan bukan harta 'corporeal' kerana wang dalam akaun adalah hutang yang harus dibayar oleh bank kepada pelanggan. Oleh kerana wang dalam akaun bank hanyalah 'chose in action', pemegang akaun tidak boleh dikatakan memiliki wang yang disimpan dalam akaun bank dan oleh itu bukan jenis harta yang boleh dimiliki oleh tertuduh di bawah s 29(1) Akta. Selanjutnya, penggubal undang-undang tidak berniat untuk memasukkan 'chose in action' dalam maksud s 29 Akta berdasarkan sub-s (4), (6), (7), (8) dan (9) s 29 di mana badan perundangan telah membayangkan bahawa harta tersebut boleh dicari dan dijumpai di lokasi geografi dan fizikal (lihat perenggan 21, 24 & 27–28).

(2) Sekiranya penggubal undang-undang berniat agar perkataan 'harta' merangkumi harta 'corporeal' dan harta bukan 'corporeal', maka perkataan 'harta' akan digunakan secara konsisten sepanjang s 29 Akta tanpa menggunakan juga perkataan 'anything' atau 'thing'. Penggunaan secara sengaja perkataan 'anything' dan 'thing' selain dari perkataan 'harta' dalam s 29(1) Akta bertujuan untuk merujuk kepada harta 'corporeal' atau harta ketara dan untuk alasan itu, s 29(4) Akta mesti bermaksud lokasi di mana harta ketara dan harta alih boleh dijumpai. 'Chose in action' bukanlah 'thing' yang termasuk dalam erti kata dan ruang lingkup 'pemilikan' dan 'harta' di bawah s 29(1) Akta (lihat perenggan 29 & 32).

(3) Oleh kerana mahkamah berpendapat bahawa 'harta' di bawah s 29(1) Akta tersebut tidak termasuk harta tidak ketara seperti 'chose in action' termasuk wang di dalam bank, tidak mungkin terdapat kesalahan bagi memiliki harta tersebut di bawah peruntukan tersebut. Oleh itu, pertuduhan-pertuduhan tersebut dibuat secara salah terhadap perayu dan oleh itu tidak sah. Oleh kerana pertuduhan-pertuduhan tersebut dibuat berdasarkan pemahaman dan pemakaian undang-undang yang salah pada dasarnya, maka pertuduhan-pertuduhan tersebut adalah cacat dan tidak boleh dibetulkan sama ada dengan pemakaian s 156 atau s 422 KTJ. Pertuduhan-pertuduhan tersebut tidak membuktikan kesalahan di bawah undang-undang dan akibatnya, perbicaraan tersebut adalah batal (lihat perenggan 34 & 36).

(4) Mahkamah tidak bersetuju dengan hujahan responden bahawa perayu tidak dikelirukan oleh semua pertuduhan tersebut memandangkan dia telah membela diri daripada pertuduhan-pertuduhan tersebut semasa perbicaraan. Jelas perayu telah dikelirukan apabila sejak awal lagi perkara utama iaitu wang dalam akaun bank tersebut tidak termasuk dalam ruang lingkup s 29(1) Akta dan itu tentunya memprejudiskan perayu. Ini

bukan merupakan kes di mana terdapat kesalahan atau kalalaian dalam menyatakan kandungan kesalahan tetapi merupakan kes di mana undang-undang tidak terpakai untuk fakta yang menjadi permasalahan (lihat perenggan 37).

(5) Berdasarkan dapatan-dapatan di atas, mahkamah mendapati bahawa semua pertuduhan tersebut pada dasarnya cacat, salah dari segi undang-undang dan tidak dapat dibetulkan. Atas dasar itu, majistret telah terkhilaf apabila mendapati bahawa kes prima facie telah dibuktikan oleh responden. Tidak terdapat penilaian kehakiman mengenai isu sama ada undang-undang tersebut terpakai ke atas fakta-fakta yang dinyatakan dalam pertuduhan-pertuduhan tersebut. Pembelaan tidak seharusnya dipanggil dan sabitan adalah terbatal (lihat perenggan 38).]

Cases referred to

Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1, CA (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)
Che Man bin Che Mud v PP [1994] MLJU 354; [1994] 4 CLJ 823, HC (refd)
Folley v Hill (1848) II HLC 28; 9 ER 1002, HL (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1; [1997] 4 CLJ 6, CA (refd)
Hari Bhadur Ghale v PP [2012] 6 MLJ 597; [2012] 7 CLJ 789, FC (refd)
Jason Chan Huan Seng & Ors v PP and other appeals [2015] 1 MLJ 701; [2015] 2 CLJ 605, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28; [1955] 1 LNS 53 (refd)
Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875; [2014] 7 CLJ 897, CA (refd)
Noor Ismahanum Mohd Ismail v PP [2019] 2 MLJ 536; [2018] 10 CLJ 597, CA (refd)
N Joachimson (A Firm Name) v Swiss Bank Corporation [1921] 3 KB 110, CA (refd)
PP v Dato' Sri Mohd Najib bin Hj Abd Razak [2020] 11 MLJ 808; [2020] 8 CLJ 319, HC (refd)
PP v Lawrence Tan Hui Seng [1993] 4 CLJ 221, CA (refd)
PP v Margarita B Cruz [1988] 1 MLJ 539; [1987] 1 LNS 129 (refd)
R v Davenport [1954] 1 All ER 602 (refd)
Ravindran a/l Ramasamy v PP [2015] 6 MLJ 509; [2015] 3 CLJ 421, FC (refd)
RK Dalmia v Delhi Administration AIR 1962 SC 1821, SC (folld)
Shawal bin Hj Mohd Yassin v PP [2006] 4 MLJ 334; [2006] 6 CLJ 392, HC (folld)
Tan Boon Kean v PP [1995] 3 MLJ 514, FC (refd)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the

A *estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561, FC (refd)
Toh Ah Loh And Mak Thim v Rex [1949] 1 MLJ 54; [1948] 1 LNS 72 (refd)

Legislation referred to

B Anti-Money Laundering, Anti-Terrorism Financing and Unlawful Activities Act 2001
Criminal Procedure Code ss 112, 156, 422
Dangerous Drugs (Forfeiture of Property) Act 1988
Insolvency Act 1967
C Interpretation Act 1948 and 1967 s 17A
Minor Offences Act 1955 ss 2, 29, 29(1), (2), (3), (4), (6), (7), (8), (9)
Penal Code ss 383, 403, 404, 405, 406, 407, 408, 409, 410, 411, 420, Chapter XVII
Probate and Administration Act 1959

D *Gunaseelan a/l S Thambinathan (Balwant Singh a/l Purba Singh and Eng Yuh Pei with him) (Chan Eng & Co) for the appellant.*
Yasinnisa Begam bt Seeni Mohideen (Deputy Public Prosecutor, State Legal Advisor's Office) for the respondent.

E **Mohd Radzi JC:**

MATTER BEFORE THIS COURT

F **[1]** This an appeal ('appeal') by the appellant against both conviction and sentence. The appellant was charged for three offences under s 29(1) of the Minor Offences Act 1955 ('the Act'). The appellant was found guilty at the conclusion of the trial and was sentenced to six months imprisonment under each charge which were to run concurrently.

G **[2]** All the charges ('charge/charges') are as follows:

Pertuduhan Pertama

Bahawa kamu dari 27/01/2015 hingga 9/05/2015 bertempat di alamat 5G Lorong Delima 3, Island Glades, 11700 Gelugor, dalam Daerah Timur Laut, dalam Negeri
H Pulau Pinang, telah berada dalam milikan kamu sejumlah wang berjumlah RM22,528.00 di dalam akaun Bank Public Bank nombor 4606286306 milik kamu yang mana kamu tidak dapat memberi keterangan yang memuaskan tentang bagaimana kamu memperolehinya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 29(1) Akta Kesalahan-Kesalahan
I Kecil 1955.

Pertuduhan Kedua

Bahawa kamu dari 20/5/2015 hingga 25/05/2015 bertempat di alamat 5G Lorong Delima 3, Island Glades, 11700 Gelugor, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah berada dalam milikan kamu sejumlah wang berjumlah

RM16,180.00 di dalam akaun Bank Public Bank nombor 4606286306 milik kamu yang mana kamu tidak dapat memberi keterangan yang memuaskan tentang bagaimana kamu memperolehinya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 29(1) Akta Kesalahan-Kesalahan Kecil 1955.

Pertuduhan Ketiga

Bahawa kamu 25/6/2015 jam lebih kurang 17:30 hrs bertempat di alamat 5G Lorong Delima 3, Island Glades, 11700 Gelugor, dalam Daerah Timur Laut, dalam Negeri Pulau Pinang, telah berada dalam milikan kamu sejumlah wang berjumlah RM6J80.00 di dalam akaun Bank Public Bank nombor 4606286306 milik kamu yang mana kamu tidak dapat memberi keterangan yang memuaskan tentang bagaimana kamu memperolehinya dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 29(1) Akta Kesalahan-Kesalahan Kecil 1955.

BRIEF FACTS OF THE TRIAL

[3] Sometime in 2014, SP1 (the complainant) was acquainted with one Karnail Singh a/l Indar Singh ('Karnail') through his friend known as one Patmendar Singh a/l Balkar Singh ('Patmendar'). Karnail is the husband of the appellant. Karnail had informed SP1 that he had befriended a military officer at the Ministry of Defence, Malaysia. Karnail claimed that through that relationship he could assist SP1 in securing a contract for the grass cutting and cleaning services at the National Service Training Programme Camp Kuala Kangsar and Lumut, Perak. SP1 was requested to deposit certain amount of monies towards securing the award of the said contract.

[4] Between the periods of 27 January 2015 and 25 June 2015, SP1 had deposited a total sum of RM45,488 through six payments into a Public Bank account number 4606286306 ('account'). The said account belonged to the appellant.

[5] By 26 November 2016 SP1 found himself without the award of the said contract and a police report was made. SP2 arrested the appellant as the owner of the account and SP3 conducted investigations. The appellant was consequently charged. A total of four witnesses were called for the prosecution.

[6] The appellant's defence was essentially that the account was opened for the benefit of Karnail who was a bankrupt. Karnail had possession of the ATM card and thus control over the funds. Since the account was for the benefit of her husband, the appellant claimed that she had no reason to be suspicious of the amounts of monies deposited notwithstanding that the amounts were large.

A [7] At the end of the prosecution case the magistrate found that the prosecution had established a prima facie case against the appellant and at the conclusion of the trial, the magistrate held that the prosecution had proven its case beyond a reasonable doubt against the appellant under each of the charge and that the appellant had failed to raise reasonable doubt in the prosecution's
B case.

[8] In his grounds of judgment appearing in Vol 1 of the record of appeal the magistrate found that the appellant should have been suspicious of the deposit transactions given the value of the deposits and that the appellant could
C not have pleaded ignorance since it was found that there were cash withdrawals from the account made at the Public Bank counter and those withdrawals could have only been made by the appellant as the account holder. The magistrate also found that the appellant had reasons to believe that the monies were stolen or fraudulently obtained but deliberately neglected or failed to
D enquire from Karnail the source of the funds since Karnail was a bankrupt. The magistrate held that the appellant's explanation of the circumstances of the deposit of the monies was not plausible. Consequently the appellant was found guilty of the offences as charged and she was sentenced to an imprisonment
E term of six months under each charge to run concurrently. A stay of execution was obtained pending disposal of this appeal.

THE APPEAL

F *Grounds of appeal*

[9] The appellant's petition of appeal rest on, inter alia, the following issues:

(a) that the magistrate erred in fact and in law not finding the charges as being defective since the charges did not specify as an ingredient under
G s 29(1) of the Act that the monies were either stolen or fraudulently obtained and did not disclose the commission of any offence;

(b) that the magistrate erred in fact and in law finding that the appellant had possession of the monies that were deposited into the account;

H (c) that the magistrate erred in fact and in law in failing to call Karnail and Patmendar under s 29(2) of the Act to offer an explanation regarding the monies;

(d) that the magistrate erred in fact and in law in finding that a prima facie
I case was established by the prosecution at the end of the prosecution case and that the prosecution had successfully proven its case against the appellant beyond reasonable doubt at the conclusion of the trial;

(e) that the magistrate erred in fact and in law in finding that the monies that were deposited by SP1 into the account were stolen or fraudulently

obtained and that the magistrate failed to consider the statement given by the appellant to the police and her testimony; and

(f) that with regards to sentence, the sentence was excessive since the appellant was a first time offender.

HEARING OF THE APPEAL

Submissions by appellant

[10] At the hearing of the appeal, arguments were presented based on the points stated in the petition of appeal. On the finding of guilt, the appellants contended, inter alia, that: (a) the charges were defective because monies held in account is a chose in action and therefore it cannot come within the meaning of the word 'anything' as provided in s 29(1) of the Act; (b) based on the principles of law of banking monies in an account does not belong to the account holder and thus the holder of the account cannot be said to be in possession of the monies under s 29(1) of the Act; (c) possession under s 29(1) of the Act refers to physical custody and control of a tangible object and not monies in an account; (d) the framing of the charges are defective as they do not disclose an offence under s 29(1) of the Act in that it did not state that the monies were either stolen or fraudulently obtained but merely in the possession of the appellant; (e) that the evidence of the prosecution witness SP1 and SP3 supported the defence of the appellant in that there was a satisfactory and reasonable explanation by the appellant on the circumstances of the opening and operation of the account; (f) the appellant was prejudiced and deprived of a fair trial when the statement of Karnail to the police under s 112 of the Criminal Procedure Code who was initially charged under s 420 of the Penal Code and was later discharged not amounting to acquittal and which would have proved that the appellant was not involved in the affairs between Karnail, Patmendar and SP1 was not provided to the appellant despite requests made to the prosecution; (g) the appellant was prejudiced and deprived of a fair trial when Patmendar who was instrumental in the transaction between Karnail and SP1 was not called as a witness for the prosecution nor offered as a witness to the defence; (h) the magistrate had erred when he placed a legal burden on the appellant to prove her innocence when the magistrate held that the appellant had failed to call witnesses to support her case that she handed over monies that were withdrawn from the account to Karnail; and (i) the magistrate erred in finding that there was no reasonable explanation by the appellant as required under s 29(1) of the Act when the requirements under that provision is that the thing must have either been stolen or fraudulently obtained.

Submissions by the respondent

[11] In counter argument to the issues raised by the appellant, the respondent submitted, inter alia, that: (a) although the word 'anything' and 'property' as used in s 29 of the Act is not defined by the Act nor the Interpretation Acts 1948 and 1967 (consolidated and revised 1989), the reference to the definition of 'property' found in other statutes such as the Dangerous Drugs Act (Forfeiture of Property) 1988, Insolvency Act 1967, Probate and Administration Act 1959 and Anti-Money Laundering, Anti-Terrorism Financing and Unlawful Activities Act 2001 shows that property includes monies in account and for that reason this court must interpret the word 'property' to include monies held in an account; (b) that the word 'possession' must also include both tangible and intangible property; (c) although the charges did not specifically state that the monies were reasonably suspected to be stolen or fraudulently obtained, the appellant was not misled by that error as the prosecution had produced evidence consistent with proving the elements of the offence under s 29(1) of the Act; (d) that it was an indisputable fact that the account was in the name of the appellant, the monies that are the subject matter of the charges were proven to have been deposited into the account by SP1 and the appellant had withdrawn those monies from the Public Bank counter; (e) that the appellant had cause to reasonably suspect that the monies were either stolen or fraudulently obtained by Karnail given that he was a bankrupt and there was no evidence that he had any source of income; and (f) thus the decision of the trial court in finding the appellant guilty of the offences was correct.

THE LAW RELATING TO APPEALS

[12] In *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875; [2014] 7 CLJ 897, Zawawi Salleh JCA (as he then was) had clearly set out the principles pertaining to the powers of an appellate court:

> [4] ... We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;
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> (e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned.

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395 (CA)).

DELIBERATIONS BY THIS COURT

Offence under s 29(1) of the Act

[13] Section 29(1) of the Act states as follows:

Any person who has in his *possession* or conveys in any manner *anything* which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[14] After hearing submissions from both the appellant and the respondent, this court finds that the crux of this appeal lies in the deliberation of the issues of law raised by the appellant. The issues of law is premised on the legality of the charges. If this court finds them in favor of the appellant, the outcome of this appeal would have been decided without need for further consideration on the issues of fact and evidence pertaining to the alleged commission of the offences. These issues of law are: (a) whether the word 'property' under s 29(1) of the Act includes monies held in a bank account; (b) whether there can be 'possession' of monies in a bank account within the context of s 29(1) of the Act; and (c) if the answers to these issues are in favor of the appellant then was there an error or omission in stating the ingredients or particulars of the offence in the charges and whether the error or omission can saved by either ss 156 or 422 of the Criminal Procedure Code.

Rules of interpretation

[15] The shoulder note to s 29 of the Act describes the offence under that section to be one that relates to 'fraudulent possession of property'. Section 29(1) of the Act then uses the word 'anything' instead of 'property' in describing the ingredient of the offence. Neither the word 'property' nor 'anything' is defined under ss 2 and 29 of the Act nor the Interpretation Acts 1948 and 1967 (consolidated and revised 1989). Thus, in interpreting the meaning of these words, this court must be guided by established legal principles on interpretation of statutes.

[16] First and foremost, reference is made to s 17A of the Interpretation Act 1948 and 1967 (Consolidated and Revised 1989). Section 17A clearly states that in the interpretation of a provision of an Act:

> ... a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[17] In *Hari Bhadur Ghale v Public Prosecutor* [2012] 6 MLJ 597; [2012] 7 CLJ 789, the Federal Court stated as follows:

> [11] ... it is necessary to revert to some basic principles or canons of statutory interpretation.
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> [12] Firstly, the object of statutory interpretation is to determine what the words of a statutory provision mean. It may be, inter alia, either by way of strict literal meaning, ordinary and natural meaning, the golden rule, the purposive approach (mischief rule), the value-based approach or the *ejusdem generis rule*.
>
> [13] Secondly, where the words are unambiguous, plain and clear they must be given their natural and ordinary meanings. 'It is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral' (see *Public Prosecutor v Sihabduin bin Hj Salleh & Anor* [1980] 2 MLJ 273; *Tan Weng Chiang v Public Prosecutor* [1992] 2 MLJ 625). Further, it should be borne in mind the 'dictum that one should not 'twist and outstretch the language beyond its common usage' (see *Cheong Seok Leng v Public Prosecutor* [1988] 2 MLJ 481; [1988] SLR 565).
>
> [14] Thirdly, 'that the words used in a section must be given their plain grammatical meaning'. It is also an important rule that a statute should be construed as a whole. Where the court is dealing with two sub-sections of a section, 'it is necessary that the two sub-sections must be construed as a whole 'each portion throwing light if need be on the rest'. The two sub-sections must be read as parts of an integral whole and as being inter-dependent.' It is not legitimate for the court to rewrite the subsections (Emphasis added.) (see *Madanlal Fakirchand Dudhediya v Shree Changdeo Sugar Mills Ltd & Ors AIR* 1962 SC 1543; *NKM Holdings Sdn Bhd v Pan Malaysia Wood Bhd* [1987] 1 MLJ 39).
>
> [15] Fourthly, 'that not just a single rule of interpretation should be contemplated, pursued and employed in interpreting any statute to the exclusion of all others; one should test the said single rule with other rules and general presumptions wherever appropriate' (see *Kesultanan Pahang v Sathask Realty Sdn Bhd* [1998] 2 MLJ 513).
>
> [16] Fifthly, that in interpreting a penal provision any doubt therein should be given to the accused person.

[18] More recently, in *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ

721; [2020] 7 CLJ 561, the Federal Court had set summarised the rules on the interpretation of statutes as follows:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed. Even if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited.' Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself.

[19] Thus, in interpreting the meaning of the word 'property' and 'anything', this court must read and give meaning to the words in the context of the provision and legislation. This court cannot without just reasons export in those words meanings that are not intended by that law merely to fill in the gaps. In another Federal Court decision of *Tan Boon Kean v Public Prosecutor* [1995] 3 MLJ 514, Mohd Azmi FCJ in delivering the decision of the Federal Court stated thus:

> On interpretation of statutes, the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in any gaps disclosed (see *Magor & St Mellons Rural District Council v Newport Borough Council* [1952] AC 189 at p 191; [1951] 2 All ER 839 at p 842). The court has no power to change any words used by the legislature. Further, where the words are simple and clear, it is the

duty of the court of law to give these words their natural meaning even though such interpretation leads to apparent anomalies.

Interpretation of the words 'property' and 'possession' and 'anything'

[20] As correctly submitted by the respondent, the word 'property' as generally defined in law and as particularly found in the laws referred to by the respondent such as Dangerous Drugs (Forfeiture of Property) Act 1988, Anti Money Laundering, Anti Terrorism Financing and Unlawful Activities Act 2001 and Probate and Administration Act 1959 and as demonstrated in the cases of *Noor Ismahanum Mohd Ismail v Public Prosecutor* [2019] 2 MLJ 536; [2018] 10 CLJ 597 and *Jason Chan Huan Seng & Ors v Public Prosecutor and other appeals* [2015] 1 MLJ 701; [2015] 2 CLJ 605, include both tangible and intangible property. However, whether such scope of definition applies to s 29 of the Act must, based on the rules of interpretation referred to above, be guided by the context and provision of the Act. This court cannot borrow or import the wide and specific definitions of the word 'property' as found in the laws referred to by the respondent as these definition serves the specific laws in which those definitions are contained. To do that would be to provide an interpretation that may not have been originally intended to by the Act.

[21] Dealing with the word 'property' first, this court holds the view that the reading of s 29(1) of the Act shows that the word 'property' is hinged upon the word 'possession'. Such 'property' must be able to be in the possession of an accused. Confining this court's attention to the subject matter of the charges in the present appeal, can monies in the account be in the possession of the appellant? The determination of that answer as argued by learned counsel for the appellant necessitates the consideration and understanding of the legal nature of monies held in a bank account as established by the English cases of *Folley v Hill* (1848) II HLC 28; 9 ER 1002 and *N Joachimson (A Firm Name) v Swiss Bank Corporation* [1921] 3 KB 110.

[22] It is established law as propounded by the English case in *Folley v Hill* and as accepted in Malaysia that the contractual relationship between banker and customer is one of debtor and creditor, the bank being the debtor and the customer a creditor. Monies deposited by an account holder becomes the money of the bank. In *Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1, the Court of Appeal held:

> [97] Now, what is the relationship between a banker and his customer? According to the House of Lords in *Edward Thomas Foley v Thomas Hill and Others* (1848) 2 HL Case 28, the banker and customer relationship was essentially of debtor and creditor. In holding that the relationship of the banker and customer was one of debtor and creditor and not that of trusteeship, Lord Brougham had this to say at p 44 of the report:

> This trade of a banker is to receive money, and to use it as if it were his own, he becoming debtor to the person who has lent or deposited with him the money to use as his own, and for which money he is accountable as a debtor. That being the trade of a banker, and that being the nature of the relation in which he stands to the customer, I cannot, without breaking down the bounds between equity and law, — without, as it were, removing the land-marks of jurisprudence, — I cannot at all confound the situation of a banker with that of a trustee, and conclude that the banker is a debtor with a fiduciary character.

[23] In *R v Davenport* [1954] 1 All ER 602, referred to in *Banking Law* (3rd Ed) by Poh Chu Chai, Lord Goddard CJ held that:

> ... There was no larceny here because in larceny there must be an asportation. I think the fallacy that led to this charge of stealing money was this. It was thought that, because the master's account became debited, that was enough to make a theft, but, although we talk about people having money in a bank, the only person who has money in a bank is the banker. If I pay money into my bank, either by paying cash, or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor and creditor. He does not hold my money as an agent or trustee. The leading case of *Foley v Hill* exploded that idea. When the banker is paying out, whether in cash over the counter or whether by crediting the bank account of somebody else, he is paying out his own money, not my money, but he is debiting me in my account with him. I have a chose in action, that is to say, I have a right to expect that the banker will honour my cheque but he does it out of his own money. Therefore, this money paid on these cheques was the banker's money, though it led to the customer's account being debited.

[24] Thus monies in an account is recognised as a chose in action and not corporeal property since monies in an account is a debt owed by the bank to the customer (see p 441 of *Criminal Law in Malaysia and Singapore* (3rd Ed by Stanley Ho). In the case of *Che Man bin Che Mud v Public Prosecutor* [1994] MLJU 354; [1994] 4 CLJ 823, the court held:

> A person has a RM100 currency note. That is movable property. He deposits the note at a bank and gets an acknowledgment of credit in a bank deposit book. The bank deposit book is movable property, but the fact, as evidenced by the credit in the deposit book, that the bank owes him money to the value of RM100 is not movable property. This is not the same as having a RM100 note in the deposit book. The person does not have a RM100 note. All that he has is the right to claim the RM100 note or its equivalent from the bank. That right is not corporeal property...

[25] Hence, since monies in an account is an incorporeal or intangible property and stands in debit in favor of the account holder, can the owner of that account be said to be in 'possession' of that monies? In *Leow Nghee Lim v Reg* [1956] 1 MLJ 28; [1955] 1 LNS 53, Taylor J stated:

> The word 'possession' is one of the most difficult of English words. It is derived from posse to be able and sedere to sit or occupy. The fundamental concept is power of

occupation; primarily this referred to land and later the meaning was extended to power of user of a chattel. The primary lay meaning of possess is to hold as property, to own. The primary legal meaning of possess is to have possession, as distinct from ownership. This is well illustrated by the popular phrase for a sheriffs agent, 'A man in possession,' who really has only custody. Shakespeare more accurately called him a bum bailiff. In this Ordinance custody is distinguished, and I think 'possession' means possession irrespective of whether the possessor is the beneficial owner. Probably the most helpful definition of possession is:

> The relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing admits, to the exclusion of other persons.

[26] In the oft quoted case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17, the court held:

> In my experience there is no question which magistrates find more difficult to deal with than this question of what amounts to 'possession' for the purposes of the criminal law. Much of this difficulty arises from a failure to appreciate that in reality there are two separate questions involved. The first is whether the accused party was in possession of the article in question and the second by reason of the application of the *maxim actus non facit reum nisi mens sit rea* is whether he had knowledge of the nature of the thing possessed.
>
> 'Possession' itself as regards the criminal law is described as follows in *Stephen's Digest* (9th Ed, p 304):
>
> > A moveable thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

[27] Since monies in a bank account is merely a chose in action this court agrees with the appellant that an account holder cannot be said to be in possession of monies held in a bank account and hence is not the type of property that can be in the possession of an accused under s 29(1) of the Act (see *Che Man bin Che Mud*).

[28] That an intangible property such as a chose in action cannot have been intended by the legislators to be within the ambit of under s 29 of the Act can also be seen through the provisions of s 29(4), (6), (7), (8) and (9) of the Act where the Legislature had envisaged that the property could be searched and found in geographical and physical locations such as a buildings and modes of transport. Learned deputy public prosecutor argued that the word 'includes' in s 29(4) of the Act served to provide a wider meaning of where the possession of the property can be found and it was not a limitation to locating monies in a bank account. To this argument, this court states that equal attention must also be given to the words 'anything' used in s 29(1) and (2) of the Act and the word

'thing' used in s 29(3) of the Act:

> (1) Any person who has in his possession or conveys in any manner *anything* which may be reasonably suspected of being stolen or fraudulently obtained shall, if he fails to account satisfactorily how he came by the same, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.
>
> (2) If any person charged with having or conveying *anything* stolen or fraudulently obtained declares that he received the same from some other person, or that he was employed as a carrier, agent or servant to convey the same for some other person, the magistrate may cause every such other person, and also, if necessary, every former or pretended purchaser or other person through whose possession the same has passed, provided that such other person is alleged to have had possession of the same within the jurisdiction of such magistrate, to be brought before him and examined, and may examine witnesses upon oath touching the same.
>
> (3) If it appears to such magistrate that any person so brought before him had possession of *such thing* and had reasonable cause to believe the same to have been stolen or fraudulently obtained such person shall be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding one year or to both.

[29] The plain and ordinary meaning of a 'thing' as a noun refers to an object (see: *https://dictionary.cambridge.org/dictionary/english/thing*). If the legislators had intended the word 'property' to include both corporeal and incorporeal property, then in this court's view the word 'property' would have been used consistently throughout s 29 of the Act without using also the words 'anything' or 'thing'. As an illustration, when one reads Chapter XVII of the Penal Code on offences against property, in particular, referring to ss 403–411 of the Penal Code on criminal misappropriation of property, criminal breach of trust and receiving stolen property, the word 'property' is consistently used in each of those provisions without any use of other words to refer to that property. Although the word 'property' is not defined under the Penal Code, it has been established by judicial decisions that unless specifically provided (see s 383 on theft of moveable property) 'property' includes both corporeal property and incorporeal property including chose in action (see ss 405 and 409 on criminal breach of trust and decided cases for example *Public Prosecutor v Lawrence Tan Hui Seng* [1993] 4 CLJ 221; *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6; *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808; [2020] 8 CLJ 319). Notwithstanding that the word 'anything' is found in ss 383 (extortion) and 410 (stolen property) of the Penal Code, those words have specific references within the context of that provision. In s 383 the word 'anything' refers to something that is signed and sealed that can be converted into valuable security, whilst in s 410 'anything' refers to a thing that is acquired by the conversion or exchange of a stolen property. Returning to s 29 of the Act, the words 'anything'

and 'thing' must therefore be read in the context of that provision. In this Court's view the deliberate use of the words 'anything' and 'thing' apart from the word 'property' in s 29 of the Act, in particular s 29(1) of the Act, were intended to refer to corporeal or tangible property and for that reason s 29(4) of the Act must mean locations where a tangible and moveable property can be found.

[30] Learned deputy public prosecutor sought to argue by referring to *Chan Pean Leon v Public Prosecutor*, *Leow Nghee Lim v Regina* and *Toh Ah Loh And Mak Thim v Rex* [1949] 1 MLJ 54; [1948] 1 LNS 72 that since the appellant had opened the account and had the accompanying right to administer the account, to deposit or withdraw any monies then it is the appellant who has knowledge, control and custody of the monies in the account and not the bank. Thus, the appellant had possession over the same. This court declines to agree with the respondent for the reason that the respondent had failed to make a distinction between the issue of possession and ownership. In this court's opinion whilst an account holder may have ownership of monies in a bank account, in real terms the monies become the monies of the bank as clearly propounded by *Folley v Hill* and the bank stands as a debtor to the account holder. The account holder does not have possession of the monies until the bank physically pays out the monies to the account holder. Until that happens, as stated earlier, the account holder merely has a right in a chose in action.

[31] It would be imperative for the sake of a fuller discussion on the issue to refer at this point to the Indian Supreme Court decision in *RK Dalmia v Delhi Administration* AIR 1962 SC 1821. In that case one of the points argued was that monies in a bank account was a chose in action and therefore it was an immoveable property and thus cannot be a property within the ambit of s 405 of the Indian Penal Code which is equivalent to s 405 of the Malaysian Penal Code (on criminal breach of trust). In expressing the view that the word 'property' in that provision includes both moveable and immoveable property which covers also a chose in action, the Supreme Court stated as follows:

> Mr Dingle Foot contends that no offence of criminal breach of trust has been committed as the funds of the Bharat Insurance Company in the Bank do not come with the expression 'property' in s 405 IPC It is urged that the word 'property' is used in the Indian Penal Code in different senses, according to the context, and that in s 405 it refers to movable property and not to immovable property or to a chose in action.
>
> It is then contended that the funds which a customer has in a bank represent closes in action, as the relationship between the customer and the banker is that of a creditor and a debtor, as held in *Attorney General for Canada v Attorney General for Province of Quebec & Attorneys General for Saskatchewan, Alberta & Manitoba (1) and in Foley v Hill (2).*
>
> Reliance is also placed for the suggested restricted meaning of property in s 405 IPC

on the cases *Reg v Girdhar Dharamdas (3)*; *Jugdown Sinha v Queen Empress (4)* and *Ram Chand Gurvala v King Emperor (5)* and also on the scheme of the Indian Penal Code with respect to the use of the expressions 'property' and 'movable property' in its various provisions.

The learned Solicitor General has, on the other hand, urged that the word 'property' should (1) [1947] AC 33; (2) [1848] 2 HLC 28 9 ER 100; (3) [1869] 6 Bom High Ct Rep (Crown Cases) 33; (4) (1895)1 LR 23Cal 372; (5) AIR 1926 Lah 385 be given its widest meaning and that the provisions of the various sections can apply to property other than movable property. It is not to be restricted to movable property only but includes chose in action and the funds of a company in Bank.

We are of opinion that there is no good reason to restrict the meaning of the word 'property' to movable property only when it is used without any qualification in s 405 or in other sections of the Indian Penal Code Whether the offence defined in a particular section of the Indian Penal Code can be committed in respect of any particular kind of property will depend not on the interpretation of the word 'property' *but on the fact whether that particular kind of property can be subject to the acts covered by that section. It is in this sense that it may be said that the, word property in a particular section covers only that type of property with respect to which the offence contemplated in that section can be committed.* (Emphasis added.)

[32] Thus, guided by the views expressed by the Supreme Court of India in the afore referred case, this court is fortified in holding the view that on the facts of the present appeal and reading s 29 of the Act as a whole a chose in action is not a 'thing' that is within the contemplation and scope of 'possession' and 'property' under s 29(1) of the Act.

[33] Learned deputy public prosecutor also endeavored to persuade this court to adopt the view that since the Act was enacted in the 1950's, the interpretation of the word 'property' must be given a meaning that is consistent with the development of banking practices and the extensive use of bank accounts and services that is currently prevalent. In response to this argument, this court need only refer to the rules of interpretation alluded to earlier. The reasons offered by the respondent for this court to justify giving the widest interpretation to the word is simply not tenable when looking at the provision of s 29 of the Act as a whole, the employment of the words 'possession', 'anything' and 'thing' and the established legal principles under the law of banking regarding the nature of monies held in a bank account. The interpretation of a penal provision cannot be blind to the relevancy and application of legal principles in other areas of the law that are pertinent to the subject matter of the provision under consideration and therefore must be interpreted within the relevant context. Further, any doubt on a penal provision must be given in favor of the accused (see *Hari Bhadur Ghale v Public Prosecutor*).

[34] Returning to all the charges in the present appeal, since this court holds

the view that 'property' under s 29(1) of the Act does not include intangible property such as a chose in action of which monies in a bank constitutes, there cannot be an offence for possession of such property under that provision. The charges were therefore wrongfully brought against the appellant and is therefore illegal.

[35] In *Public Prosecutor v Margarita B Cruz* [1988] 1 MLJ 539; [1987] 1 LNS 129, KC Vohrah J held:

> I have time and again exhorted DPPs and magistrates to read the provision in the Act which creates the offence especially in regard to unfamiliar charges, and to scrutinize the charge with which the accused is charged. This charge under the Passport Act is not the sort of charge that comes up often and it is with precisely this sort of charge that the magistrate should have called for the statute from the prosecuting officer or from the library to check the provision under which the charge was made. If the law is not read, how would the magistrate then be able to find out the essential ingredients which constitute the charge? And if a magistrate does not know what the ingredients of the charge are, how is he or she able to explain the charge to the accused? It behoves all magistrates and presidents to scrutinize the charges, to read the provision of the statute under which the charge is framed, to understand the constituent ingredients of the charge, to know the nature of the punishment and appreciate the gravity of the charge. If the charge is defective or badly framed, the magistrate should point out the defects and request the prosecuting officer to amend the charge as the accused should truly understand the nature of the charge he is asked to plead to (see *Lim Beh v Opium Farmer* (1808–84) 3 Ky 10; *Jagar Singh v Public Prosecutor* [1936] MLJ 114).
>
> Prosecuting officers and magistrates should also heed the advice of Thomson J. (as he then was) in the case of *Public Prosecutor v Syed Bakri* [1955] MLJ xvii as to how a charge should be framed. (See also *Public Prosecutor v Lim Yoo Hock* [1984] 1 MLJ 309.)
>
> Then again, when the prosecuting officer gives the facts relating to the charge implicating the accused where the accused has pleaded guilty, the magistrate should be vigilant to see that the facts make out the ingredients relating to the charge and where the accused states facts which show that one or more of the essential ingredients have not been made out, then notwithstanding the plea of guilty, the magistrate should reject the plea and fix a date for evidence to be adduced at a trial.

[36] Since the charges were made based on a fundamentally flawed understanding and application of the law, the charges must therefore be defective and cannot be cured whether by the application of ss 156 or 422 of the Criminal Procedure Code. The charges did not establish an offence under the law and the trial was consequentially a nullity. In *Shawal bin Hj Mohd Yassin v Public Prosecutor* [2006] 4 MLJ 334; [2006] 6 CLJ 392, Azhar Mohamed J (as he then was) held:

> [12] ... In my view s 156 has application only in a situation where there is an error either in stating the offence or the particulars required to be stated in the charge or

there is an omission to state the offence or those particulars. In other words that section provides for a cure should there be any non-compliance with the technical provisions of the law. I do not think that provision can be invoked in the case at hand in a situation where the charge was defective as disclosing no offence under the section of the Act. I do not consider that this is an irregularity curable under s 156 In the same way, the application of s 422 is constrained to remedy no more than technical defects in the charge. To me where a trial in the court below is conducted on the basis of a charge which is defective as not disclosing an offence under the relevant section, it is an illegality which cannot be cured by s 422 ...

[13] The defect in the charge was a matter of substance and not merely of form. This was not a mere technical non-compliance of any provision of the law which can be condoned as an irregularity. I do not think it can be cured without causing injustice to the appellant. In my view, this was not a defect, disregarding it would not occasion a miscarriage of justice. To me the charge as framed did not disclose any offence and therefore I have no doubt that the defect of this kind was an illegality. I think the appellant was left in doubt as to the offence of which he had been convicted and sentenced. It is a fundamental principle of criminal law in our country that an accused person should know accurately of what offence he has been convicted and sentenced. In my judgment the error in the charge did cause prejudice and injustice to the appellant. In the end, I have no hesitation in saying that the charge framed against the appellant was bad in law. When looked in this way, one can see that there has been a substantial miscarriage of justice. As a consequence, the conviction in this case was a nullity.

[37] Guided by the decision in *Shawal bin Hj Mohd Yassin* this court cannot agree with the argument of the respondent that the appellant was not misled by all the charges since she had defended the charges at the trial. Plainly the appellant was misled when the subject matter that is monies in a bank account was not within the ambit of s 29(1) of the Act to begin with and that surely prejudiced the appellant. This is not a case where there was an error or omission in stating the ingredient of the offence but a case where the law did not apply to the facts in question. As stated by the Federal Court in *Ravindran a/l Ramasamy v Public Prosecutor* [2015] 6 MLJ 509; [2015] 3 CLJ 421:

[32] The following cases did not draw the distinction between particulars and ingredients. But they nonetheless exemplify that ss. 156 and/or 422 would not be invoked to cure an error or omission in stating the ingredients of an offence.

[33] In *Chong Chee Pak v Public Prosecutor* [1948–1949] Supp MLJ 45; [1948] 1 LNS 94, where the appellant was convicted on a charge of 'assisting in the management of a public lottery', an offence not known in law, Callow J held that the conviction was a nullity (see also *Quek Ching Kim v Regina* [1956] 1 MLJ 54; [1955] 1 LNS 104, *Lee Swee Tee v Public Prosecutor* [1960] 1 MLJ 161; [1960] 1 LNS 58, where the respective charge under the Common Gaming Houses Ordinance was similarly wrongly worded, and where the conviction was either quashed and or set aside).

[34] In *Teo Peng Chow & Ors v Public Prosecutor* [1957] 1 MLJ 118; [1957] 1 LNS

88, Buhagiar J said that where there was an error in the ingredients of the charge, it could not be said that the accused was not misled:

> The next point to consider is whether this error in the charge is material or not and whether the provisions of section 156 of the Criminal Procedure Code applies. Under that section an error in a charge is not material unless the accused was in fact misled by such error or omission. It seems from the grounds of judgment of the learned magistrate that he did not consider the words in the charge referred to above were an essential ingredient in an offence under section 10 but he did not amend the charge at the close of the case for the prosecution and at that stage counsel for the defendant submitted that there was no case to answer on the ground that there was 'no evidence to show that the accused managed or assisted in the management of the club and no evidence that all three accused arranged a meeting on behalf of the club.' Under the circumstances I do not think it can be said that the appellants were not misled by the error in the charge. I, therefore, set aside the conviction and sentence and order re-trial before another magistrate.

And in C *Mohammad v Public Prosecutor* [1973] 1 LNS 9; [1974] 1 MLJ 25, Syed Agil Barakbah J, as he then was, held that as the charge disclosed no offence known to law, it was not 'necessary nor desirable for me to consider the provisions of the Criminal Procedure Code as urged by the learned Deputy Public Prosecutor because there [was] an apparent miscarriage of justice.'

Other like cases, where the charge disclosed no known offence and where the conviction was quashed and or set aside, were (i) *Periasamy & Anor v Public Prosecutor* [1993] 2 MLJ 551; [1993] 3 CLJ 46; (ii) *Tay Leong Siak v Public Prosecutor* [2002] MLJU 197, where the charge did not follow the wording of the law that created the offence, and where Low Hop Bing J, as he then was, said that the charge was so defective as to render it an illegality such that it was impossible to invoke ss 156 and 422 of the CPC; (iii) *Hazraf Ali bin Hassan v Public Prosecutor* [2012] 7 MLJ 355; [2011] 1 LNS 829, where Akhtar Tahir J held that s 156 does not apply where the defect in the charge does not disclose any known offence, and that the accused was 'prejudiced by being ignorant of the actual nature of the offence committed by him. As such he would be unable to properly defend himself'; and (iv) *Public Prosecutor v Mohamad Sabu* [2012] 7 MLJ 547; [2012] 5 CLJ 246, where Zamani A Rahim J held that the omission of ingredient is a fundamental defect that could not be cured by s 422.

DECISION

[38] In conclusion, after hearing all submissions presented before this court and based upon the deliberations set out above, this court finds that the all the charges were fundamentally defective, bad in law and incurable. On that basis, this court further finds that the magistrate had erred in finding that a prima facie case was established by the prosecution. There was no judicial appreciation of whether the law applied to the facts stated in the charges. The defence should not have been called and the conviction was a nullity.

[39] For those reasons, this appeal is allowed without need for this court to consider the other issues presented in this appeal. Conviction and sentence is hereby set aside.

Appeal allowed; conviction and sentence set aside.

Reported by Dzulqarnain bin Ab Fatar